Filed 10/2/02 In re Ernie M. CA5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

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| In re ERNIE M. et al., Persons Coming Under the Juvenile Court Law. | |
| KERN COUNTY DEPARTMENT OF HUMAN SERVICES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>SERENA R.,<br><br>Defendant and Appellant. | F040067<br><br>(Super. Ct. Nos. JD095351, JD095352, JD095353, JD095354 & JD095355)<br><br>**OPINION** |

APPEAL from a judgment of the Superior Court of Kern County. Peter A. Warmerdam, Juvenile Court Referee.

Susan J. Cowie, under appointment by the Court of Appeal, for Defendant and Appellant.

B.C. Barmann, Sr., County Counsel, and Tom Clow, Deputy County Counsel, for Plaintiff and Respondent.

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Serena R. appeals contending that the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.), or ICWA, mandated notice to the Secretary of the Interior and a stay of the dependency proceedings. Absent such notice, she contends that the dispositional orders

of the juvenile court must be reversed. She further contends that the juvenile court's denial of reunification services pursuant to Welfare and Institutions Code[1] section 361.5, subdivision (e)(1) on the basis that such services would be detrimental to the children is not supported by substantial evidence. We agree with some of her contentions and will remand the matter with specific instructions.

## PROCEDURAL AND FACTUAL SUMMARY

On October 11, 2001, the Kern County Sheriff's Department placed Ernie M., Christopher M., Veronica M., Desirae M., and Valarie R. in protective custody. The sheriff's department had attempted to serve an arrest warrant on the children's mother, Serena, when she fled, leaving the children behind.

Section 300 petitions were filed on behalf of all the children on October 15, 2001, by the Kern County Department of Human Services (Department).[2] At the time of the detention hearing on October 16, Serena had not been apprehended. After Serena was apprehended, amended petitions were filed on behalf of the children. The amended petitions alleged that the children were at risk of suffering serious physical harm because Serena had fled from law enforcement, leaving the children behind; the children did not regularly attend school, and changed residences frequently; the children were in need of medical and dental care when detained; and Serena had a history of substance abuse, including using illegal controlled substances in the presence of the children. A contested jurisdictional hearing was eventually conducted on December 18, 2001, and all allegations of the amended petitions were found true.

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[1] References to code sections are to the Welfare and Institutions Code unless otherwise specified.

[2] Christopher was subsequently declared a ward of the court pursuant to section 600 and is not a subject of this appeal.

The father, Ernie M., was deemed the presumed father of Ernie, Veronica, and Desirae. Ernie M. also claimed to be the father of Valarie. He was living with Serena prior to and after Valarie's birth and held the child out to be his own. Serena, however, claimed that Valarie's father was unknown. The juvenile court ordered paternity testing as to Valarie.

The dispositional social studies reflected that the children's father had Indian ancestry, but no notices under ICWA ever were sent to any tribe or the Secretary of the Interior.

Serena was convicted of first degree burglary and on January 14, 2002, was sentenced to a term of two years in prison. At the dispositional hearing held on February 20, 2002, Serena testified that she might be released as early as November 15, 2002. Serena did not oppose the Department's recommendation that the children be placed in long-term foster care; she opposed only the recommendation that reunification services be denied.

At the dispositional hearing, the social worker testified that the children apparently had a "good relationship" with their mother. The social worker testified that the primary reason for the Department's recommendation that reunification services be denied is that reunification could not be accomplished within 12 months because of Serena's incarceration. Counsel for the children stated that the children wished to maintain contact with their mother.

Ultimately, the juvenile court denied reunification services to Serena pursuant to section 361.5, subdivision (e)(1), but ordered that Serena be allowed regular communication and contact with the children, including visitation.

## DISCUSSION

### I. ICWA Notice

The children's father, Ernie M., reported to social services that he had Indian ancestry, although he did not believe he was eligible for enrollment in a tribe. This

Indian ancestry is first disclosed in the dispositional social study prepared on February 15, 2002. Once the Department was aware that the children *may* be Indian children, it was obligated to comply with title 25 United States Code section 1912(a) and notify the tribe, or, if the tribe is unknown, the Secretary of the Interior, of the pending proceedings. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469-470.) The affirmative duty of the Department and juvenile court to inquire whether the children may be Indian children is additionally set forth in California Rules of Court,[3] rule 1439(d).

The Department contends that no notice was required because there was no evidence the children are Indian children or that either parent was a member of a tribe. The Indian status of the children need not be certain, however, in order to invoke the notice provisions because one of the primary purposes of giving notice to the tribe is to enable the *tribe* to determine if the children are Indian children. (*In re Desiree F., supra,* 83 Cal.App.4th at p. 471.) It is the tribe who determines membership and eligibility for membership, not the Department or juvenile court. (*Id.* at p. 470.) Enrollment is not determinative of tribal membership, nor is it the only means of establishing membership, and the ICWA applies regardless of whether a child is registered or enrolled with a tribe. (*Id.* at p. 471.)

The juvenile court was obligated to stay all proceedings for a minimum of 10 days after *receipt* of this notice by the tribe or the Secretary of the Interior. (25 U.S.C. § 1912(a).) Instead, the juvenile court proceeded with the dispositional hearing five days after the date of the social services report.

The Department also contends that the issue of application of ICWA has been waived by Serena. We disagree. In *Desiree F.* this court held that failure to give notice in compliance with the ICWA affects the juvenile court's fundamental jurisdiction to act.

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**3** References to rules are to the California Rules of Court unless otherwise specified.

(*In re Desiree F., supra,* 83 Cal.App.4th at pp. 474-475.) The notice requirements of ICWA serve the interests of the tribe, and the children, irrespective of the position of the parents. Where these notice requirements are not complied with, the waiver doctrine cannot be invoked. (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267.)

*In re Riva M.* (1991) 235 Cal.App.3d 403, cited by the Department in support of its contention that the waiver doctrine applies, is factually distinguishable. In *Riva M.*, the requisite ICWA notices had been given, the tribe elected not to intervene, and the juvenile court was aware the children before it were Indian children. (*Id.* at pp. 408-411.)

Nor does *In re Pedro N.* (1995) 35 Cal.App.4th 183 support the invocation of the waiver doctrine. The parent in *Pedro N.* did not raise the issue of lack of compliance with ICWA until after the challenged order was final. (*Id.* at pp. 189-190.) Serena's appeal is timely.

**II. Reunification Services**

The juvenile court denied reunification services to Serena pursuant to section 361.5, subdivision (e)(1). Serena challenges the juvenile court's finding that providing her with reunification services would be detrimental to the children. We review the juvenile court's decision to deny reunification services under the substantial evidence test. (*In re Brian M.* (2000) 82 Cal.App.4th 1398, 1401.)

The children were removed from Serena's custody and detained on October 11, 2001. Thereafter, Serena was convicted of first degree burglary and sentenced on January 14, 2002, to a two-year prison term. Pursuant to statute, the juvenile court cannot extend services beyond 18 months from October 11, 2001, under *any* circumstances. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 447; § 366.21, subd. (g)(1).) Thus, the reunification period could not extend past April 11, 2003, which is prior to the expiration of Serena's prison term. If the child cannot be returned to the parent before the expiration of this period, the juvenile court *must* terminate services. (*In re Zacharia D., supra,* at p. 447.)

The reunification period is expressly *not* tolled by a parent's incarceration. (*In re Zacharia D., supra,* 6 Cal.4th at p. 446; § 361.5, subd. (e)(1).) Any early release date is purely speculative on Serena's part and should not be relied upon by the juvenile court.

In denying reunification services, the juvenile court noted factors other than the length of Serena's term of incarceration. One of the many factors noted by the juvenile court was that Serena had yet to enroll in parenting and substance abuse classes available to her while incarcerated.

There was more than substantial evidence to support the juvenile court's refusal to order reunification services.

Even though the juvenile court did not order reunification services be provided to Serena, the juvenile court did provide for continued contact between Serena and the children during her period of incarceration. When notified that the Department had failed to provide Serena with previously ordered visitation, and that the Department delayed by a month or more before forwarding Serena's letters to her children, the juvenile court ordered the Department promptly to forward letters and comply with the visitation schedule, or be subjected to possible sanctions and contempt.

The recommendation that the juvenile court proceed to implement a plan of long-term foster care was not contested by Serena. Furthermore, the visitation schedule and communication ordered by the juvenile court to occur between Serena and her children allows Serena to remain in contact with her children, as both she and the children's counsel requested. The disposition crafted by the juvenile court provides the children with both much-needed stability and continuing contact with their mother.

Long-term foster care does not involve a termination of parental rights. Serena will be able to maintain regular contact and communication with her children, and thus maintain a relationship with them, even while incarcerated. During her term of imprisonment, Serena may voluntarily avail herself of services offered by the Department of Corrections that would assist her in addressing and overcoming the problems that

necessitated the filing of the section 300 petitions. Upon release from prison, Serena is not precluded from filing a section 388 petition and establishing that she is willing and able properly to care for her children.

**DISPOSITION**

The disposition orders of the juvenile court are reversed as to Ernie, Veronica, Desirae, and Valarie and the matter is remanded to the juvenile court with directions that the Department provide the pertinent tribe(s) or the Secretary of the Interior with proper notice under the ICWA of the proceedings, and that the Department file proof of receipt of such notice by the tribe(s) and/or the Secretary of the Interior along with a copy of the notice. If, after notice is properly given, no tribe responds indicating that the children are Indian children within the meaning of ICWA, the juvenile court shall then reinstate the dispositional orders. If a tribe determines that the children are Indian children, then the juvenile court shall conduct the disposition hearing applying the provisions of the ICWA, section 360.6, and rule 1439.

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CORNELL, J.

WE CONCUR:

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VARTABEDIAN, Acting P.J.

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GOMES, J.